Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-193

LEONARD RUSSO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, Leonard Russo, prays that this Court grant rehearing of its Order of January 10, 1972, denying the Petition for Writ of Certiorari and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the Petition heretofore filed herein.

Reasons for Granting Rehearing and Issuing the Writ

At the time of the submission of the Petition for a Writ of Certiorari, there had not been any decision by this Court

in the case of *United States* v. *Marion*. Thereafter on December 20, 1971, this Honorable Court rendered its decision and delivered its opinion (U.S. , 30 L.Ed.2d 468, 92 S.Ct.). In the opinion of the Court, it was noted among other things that

> "No actual prejudice to the conduct of the defense is alleged or proven, * * * Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." (30 L.Ed.2d 468, 481-482)

In the instant case it was established that, in fact, the primary borrower, Giamonco, had died in 1967, six years subsequent to the commencement of the alleged conspiracy and approximately six months prior to the return of the indictment herein.

None of the defendants in the instant case testified in their own behalf. It is respectfully submitted that in the interest of justice, a Writ of Certiorari should be granted herein with the direction that the case be returned to the District Court for the purpose of taking testimony on a Hearing as to the actual prejudice suffered by the Petitioner, Russo.

In the opinion of the United States Court of Appeals, 442 F.2d 498, that Honorable Court disposed of the argu-

ment of possible prejudice by the death of Giamonco in footnote number 5 (442 F.2d 448, 503) by the callous remark

> "* * * That Giamonco's death occurred before Itkin's change of heart was hardly significant. The chief significance of that fact was that there were probably four defendants in the case rather than five."

Analysis of this observation leaves one with the inescapable conclusion that the Court of Appeals inferred and for all intent and purposes said that the testimony of a defendant upon a trial is of no value and will not normally be believed by a trial jury.

That this flies in the face of experience and is contrary to the right of a defendant to be a witness in his own behalf is too obvious to be belabored in this Petition. Although the defendant Russo did not testify upon the trial in the instant case, he could and will testify upon a Hearing wherein and whereby he will be able to develop the prejudice created by the Government's delay of over six years in seeking an indictment.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Second Circuit with the direction that the case be remanded to the District Court for the Southern District of New York for a Hearing upon the question of the prejudice suffered and sustained by the petitioner Russo by reason of the Government's delay in instituting prosecution and the intervening death of Sam Giamonco, and that subsequent such Hearing the said Circuit Court of Appeals reconsider its affirmance of the judgment, or in the alternative that determination of the within Petition for Rehearing be held in abeyance and that a copy of the transcript of the Hearing on the question of prejudice be forwarded from the District Court to this Court and to be considered in connection with the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ GILBERT S. ROSENTHAL
Gilbert S. Rosenthal
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ GILBERT S. ROSENTHAL
Gilbert S. Rosenthal
Counsel for Petitioner

APPENDIX

Opinion of the Court and Separate Opinion in *United States* v. *Marion* omitted.